United States Court of Appeals

for the Second Circuit

PETITION FOR REHEARING EN BANC

76-2155

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

MACIO ENNIS,

Petitioner-Appellant,

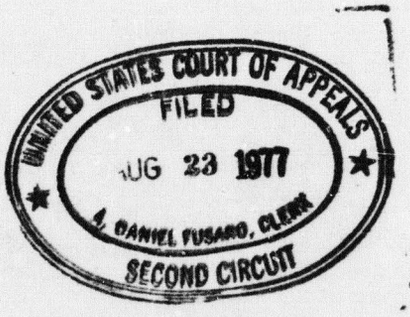
-against-

E. LeVRE, Superintendent
Clinton Correctional Facility,

Respondent-Appellee.

Docket No. 76-2155

PETITION FOR REHEARING WITH A
SUGGESTION FOR REHEARING EN BANC



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This petition is made pursuant to Rule 40(a) of the Federal Rules of Appellate Procedure for rehearing and rehearing en banc from a judgment of a panel of this Court (Gurfein, C.J.; Meskill, C.J.; Newman, D.J.) rendered on August 9, 1977, affirming an order denying a petition for writ of habeas corpus rendered in the United States District Court for the Eastern District of New York.

Appellant was tried in 1974 in the Supreme Court of Kings County on a charge of kidnapping and assault. The primary issue at the trial, at which appellant was acquitted of assault, was identification of the person who assaulted a Mrs. Reed in a darkened laundry room of an apartment house basement. A Wade identification hearing was held during the trial and the minutes of the trial show that a courtroom show-up and a photograph spread were challenged. The story here is how appellant tried to get the minutes of that hearing so that he might have a full and fair review to the state appellate courts.

After appellant was convicted in the state courts, an §18-B panel lawyer, who had not in any way been involved in the trial, was assigned to prepare the appeal. When appellant, then incarcerated, learned that the transcript of the Wade hearing had not been ordered, he wrote to the court reporter who had been in court and to his appellate attorney requesting that the minutes be ordered.

When appellant's personal efforts to obtain the transcript failed, he filed a motion in the Appellate Division asking that assigned counsel be relieved. That motion, to which counsel did not object, was denied. In that affidavit counsel made no mention of the transcript or the identification issue (a copy is attached).

Appellant then filed a pro se supplemental brief in the Appellate Division, arguing that the incomplete record denied him adequate appellate review.

On December 31, 1975, the Appellate Division modified the conviction for kidnapping in the second degree, found appellant guilty of the lesser-included offense of false imprisonment, and remanded the case for re-sentence.* People v. Ennis, 50 A.D.2d 935 (2d Dept. 1975). The court did not address the issue raised in appellant's pro se supplemental brief.**

On January 8, 1976, in the Appellate Division, Second Department, appellant filed a motion to re-argue his appeal, on the ground that he was denied adequate appellate review because the record on appeal was incomplete. Specifically, appellant argued that he had informed his §18-B panel lawyer that the Wade hearing transcript was missing and that identification was an issue in the case. The State admitted that the record on

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*On January 21, 1976, appellant was re-sentenced to a term of four years' imprisonment.

**Leave to appeal to the New York Court of Appeals was denied.

appeal had been incomplete, but contended that the deficiencies were attributable to appellant through his lawyer.* On February 5, 1976, the motion was denied.

Based on these facts, appellant argued in the district court and in this Court that the state deprived him of his right to appeal on a full and complete record and that his lawyer was incompetent.

Each of the judges on the panel of this Court which considered the issues raised wrote his own opinion.

I. State Action

Judge Meskill concluded that the state did not deprive appellant of his right to the transcript because appellant was bound by his assigned lawyer's decision not to order them. Judge Gurfein on the other hand did not find appellant bound by his counsel's decision not to order the minutes but concluded there was no state action because appellant, despite his repeated pro se efforts,

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*The Orwellian thinking which has marked this case is best shown by the state's affidavit in opposition to appellant's reargument motion in the Appellate Division. After appellant's many efforts to get the minutes at a time when he was in jail, the Assistant District Attorney had the audacity to argue:

> Appellant was represented by counsel in this case, and both he and his counsel had ample opportunity to challenge the completeness of the record or to request that the missing minutes be transcribed prior to perfecting his appeal. Having failed to avail himself of those opportunities, and to fully prepare and settle the record on appeal, he may not now urge that the record contained ommissions and deletions.

did not seek the minutes properly. Judge Newman did not address this issue at all.

The panel's opinions totally ignore the New York State procedures for ordering and transcribing the transcripts of criminal proceedings. Under the New York Criminal Procedure Law, appellant had the right to appeal from the judgment of conviction (NYCLP §460.10(a)(McKinneys 1971)) and from the order denying the motion to suppress the identification testimony (NYCPL §710.20; 710.70(2)(McKinneys 1971)). Within two days of the filing of the notice of appeal, the clerk of the Supreme Court in King's County was charged with ordering from the stenographer the minutes of the proceedings constituting the record on appeal. The stenographer, an employee of the County appointed by the judges of the court (N.Y. Judiciary Law §159(3)(McKinneys 1968)) and an officer of the court (N.Y. Judiciary Law §290 (McKinneys 1968)), was charged with filing the transcript of the proceedings with the Supreme Court when directed to do so (NYCPL §460.70(1)(McKinneys 1971)). In the case of an indigent, the Appellate Division directs that a copy of the transcript be furnished to the defendant or his attorney. Ibid. §460.70(1); see 22 NYCRR (Judiciary A) §671.3(b)(3).*

Here what occurred, is that the court reporter, a state agent, omitted a portion of the transcript, thereby failing to fulfill his obligation under the court order. Indeed, he acknowledged as much in his letter to the appellant in response to appellant's request for the omitted portion of the transcript. Significantly, the omitted portion came directly in the middle of the trial so

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*This procedure is contrary to that used in the federal courts. In the federal courts counsel selects the portions of the record to be transcribed.

that the stenographer could only have intentionally omitted them. The Appellate Division compounded the injury when it failed to direct the stenographer's compliance with the statute although it was aware and on notice of the missing portion of the transcript prior to the filing of the briefs.

Further, the district attorney acted improperly when he opposed the appellant's request for the transcript, a matter which was no affair of the prosecutor. See United States v. Durant, 545 F.2d 823 (2d Cir. 1976).

The state action here was not only present but outrageous and this Court was incorrect in finding no state action.

As noted, Judge Gurfein found that no state action was involved because appellant made no proper pro se request for the minutes. On this record, that statement is incomprehensible. There was no other way for appellant to act: he asked this attorney to order the minutes; when that failed he asked for a new attorney. In fact, at the time that appellant sought to have the lawyer relieved, the lawyer's brief was written although not filed. Thus, it is clear that even if the minutes had been ordered transcribed at that point the attorney would not have used them and therefore a motion to have him relieved was proper. When the motion was denied appellant complained to the court in a pro se supplemental brief; when that failed he asked the court again, in a motion for re-argument, for the minutes. Under New York law only an order of the Appellate Division could have resulted in production of the transcript. The court could not have been given clearer notice as to the problem, but it chose deliberately not to do anything about it. No one associated with the

state has ever suggested there was any other way to proceed. It was asserted only that appellant had never expressed any complaint about the composition of the record on appeal -- a totally false statement.

II. Competency of Counsel

Both Judge Meskill and Judge Gurfein concluded that the assertion that counsel was incompetent because of his failure to order the transcript had not been exhausted. Judge Newman concluded the issue had been exhausted, but stated that counsel was not to be faulted for not raising the issue. Judge Newman hypothesized that counsel may have learned about the identification issue from sources other than the transcript.

The motion to have the appeals lawyer relieved and counsel's response establishes that appellant was complaining about the way his lawyer represented him -- thus challenging his competency. The Appellate Division rejected his claim. Further, under New York law, appellant has no presently available remedy to raise the issue of competency of counsel. CLP §441.10 (coram nobis) relates only to trial errors. State habeas corpus is not available to challenge errors in the appellate process. Thus, the issue is whether appellant deliberately by-passed orderly state procedures for bringing his counsel's failure to help get the minutes to the state court's attention. Plainly and simply, he did not.

As for whether the attorney deliberately and intelligently gave up the identification question in the appellate court, there is, despite Judge Newman's hypothesizing, nothing in the record to

show counsel did anything with respect to that issue. Indeed, the failure of counsel to state anything about the issue in his responsive affidavit to appellant's motion to have counsel relieved is, in these circumstances, an admission that he did nothing.

As for the merits of the issue, Judge Meskill says it is frivolous; Judge Gurfein says nothing; Judge Newman says it is probably non-frivolous. On this matter, appellant's counsel cannot speak for while the state had the minutes transcribed for the panel of this Court, neither appellant nor his counsel have been given a copy of the minutes. It need only be said that no one on appellant's side has ever examined or briefed the issue for him.

III. Responsibility of Appellate Counsel

The contrast between the opinions of Judge Meskill and Judge Gurfein leaves this circuit with a conflict as to the extent to which an appellant is bound by his appeals lawyer's decisions. The seriousness of the conflict should not be underestimated for under Judge Meskill's opinion it is now possible in this Circuit for a criminal defendant to be bound, despite protests or motions to be relieved by his appellate lawyer's willful failure to order a crucial portion of the transcript of the district court proceedings to determine whether it raises an issue. The lawyer may do this even though he was not trial counsel and has no knowledge of the proceedings. Needless to say, reversals of judgments have been obtained based on portions of the transcripts which might not necessarily be expected to raise appellate issues. See e.g.,

United States v. Daniels, slip op. ___ (2d Cir. June 30, 1977); United States v. Durant, 545 F.2d 823 (2d Cir. 1976).

With no articulated standards governing the specifics of appellate counsel's responsibilities or standards for his performance, the decision in this case creates difficulties which this Court should resolve. Lawyers of varying capabilities and levels of responsibility come before this Court in matters affecting the lives of many people. They should not be permitted to assume that decisions made by them on the appeal will be forever insulated from inspection on a waiver or consent theory. More basically, appellate counsel's job is to read the record for the appeal. At the very least he should not be permitted to avoid reading that portion of the record which includes the most important trial issue.

Conclusion

For the above-stated reasons, the decision of the panel should be vacated and the judgment of the district court reversed.

Respectfully submitted,

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